(27)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 750

ENGINEERING & RESEARCH CORPORATION,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

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INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statutes involved	2
Statement	2
Specifications of errors to be urged	5
Reasons for granting this writ	5
Conclusion	11
Appendix	12

Table of Citations

Cases

Consolidated Vultee Aircraft Corporation, 58 NLRB No. 191	10
H. J. Heinz Co. v. *National Labor Relations Board*, 311 U. S. 514, 520	5
International Association of Machinists v. *National Labor Relations Board*, 311 U. S. 72, 80	5
National Labor Relations Board v. *Cities Service Oil Company*, 129 F. (2d) 933	8
National Labor Relations Board v. *Link-Belt Company*, 311 U. S. 584, 599	5
National Labor Relations Board v. *Pacific Gas and Electric Company*, 118 F. (2d) 780	8
North Carolina Finishing Company v. *National Labor Relations Board*, 153 F. (2d) 714	9
Ranco, Inc., 57 NLRB ——	10

Statutes

National Labor Relations Act, Title 29, U. S. C. A., Sections 157 and 158 (49 Stat. 449)	2

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

Engineering & Research Corporation prays that a writ of certiorari issue to review the decree of the United States Circuit Court of Appeals for the Fourth Circuit entered in the above case on October 12, 1944, enforcing the order of the National Labor Relations Board against petitioner, Engineering & Research Corporation.

Opinion Below

The decision and order of the National Labor Relations Board appears in the appendix to the National Labor Relations Board's brief (R. 1-9). The opinion of the Circuit Court of Appeals, No. 5256, has not yet been reported (R. 219).

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on October 12, 1944 (R. 219). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

Questions Presented

Is the Circuit Court of Appeals justified in holding that an employer is guilty of unfair labor practices, as defined by Section 8 (1) and (2) of the Act, 29 U. S. C. A., Section 158 (1) and (2), when the Circuit Court of Appeals has held that there was no substantial evidence that the employer intended to violate the Act, and when there is no evidence that the employees had a reasonable and justifiable cause to believe that they did not have a free, complete and unhampered freedom of choice, and when there is no evidence that the employees had any fear of loss of their jobs or of discrimination by the employer induced by the activities of any employee?

Statutes Involved

Statutes involved are set forth in the appendix, *infra*.

Statement

This case involves a petition of the National Labor Relations Board to enforce its order against the Engineering & Research Corporation requiring the latter to cease and desist from unfair labor practices, as defined in Section 8 (1) and (2) of the National Labor Relations Act, 29 U. S. C. A., Section 158 (1) and (2), to withdraw recognition from the Independent and completely to disestablish it as the bargaining representative of Engineering & Research Corporation employees, and to post certain notices,

and presents for determination the question of the validity of this cease and desist order.

The petitioner, Engineering & Research Corporation, was organized in the District of Columbia in 1930, and was engaged in experimenting in the manufacture of airplanes and making machine tools. In 1936, the organization was incorporated and moved to Riverdale, Maryland, where it is now established. Up to this time, it had in its employ 250-300 men. In 1942, the entire plant was converted to the manufacture of vital war material, and from that date to this has been engaged one hundred per cent in producing war materials. The number of employees had increased to about 1,800 at the time the complaint in this case was filed, and it now employs about 2,800. It has been awarded the Army-Navy "E" for excellence, and also received an additional award of a star for its flag for excellence. During the twelve years of its business, up to 1942 when this complaint was filed, cordial relations existed between management and employees, and there had been no labor dispute between the petitioner and its employees.

A few employees of the petitioner initiated discussions regarding the formation of an independent and unaffiliated union about a month and a half before this dispute arose. The discussions ended in no affirmative action and temporarily the idea was dropped. It is apparent that two employees, Perlstein and Rappaport, heard of this discussion, by rumor or otherwise; and they decided to attempt to organize within the plant a union affiliated with the CIO. Perlstein came to Washington, and had a conference with Mr. Wagner, a CIO organizer (R. 156, 167). Perlstein, et al., under the guidance of Mr. Wagner, then started their campaign (R. 157). In two days the CIO organizers distributed three thousand pamphlets among the employees of the petitioner as they entered the plant (R. 24,

R. 153). Attached to these pamphlets were membership cards in the CIO for signature by the employees (R. 151). In view of the definite and affirmative action on the part of Perlstein, Rappaport and Goss, certain employees of the petitioner revived the idea of establishing an independent and unaffiliated union. It was apparent that they did not care to join or affiliate with the CIO (R. 179, 66). To meet the campaign of the CIO, it was essential that they take immediate, rapid and definite action to determine the consensus of the employees within the plant (R. 66). Both the CIO and the Independent continued their operations and campaigning for membership in their respective organizations within and without the premises of the petitioner. The Independent and the CIO held several meetings outside of the plant, at which the largest attendance of the latter was twenty (R. 24), and the former had as many as one hundred employees present (R. 31). The Independent within a few days secured 1,064 signatures to petitions desiring an unaffiliated and independent union. The CIO campaign fell flat. Disappointed at their inability to organize a majority of the employees, the CIO filed its complaint against the petitioner.

During the campaign by both the CIO and the Independent within and on the property of the petitioner, the President and executive officers of the petitioner were without notice and were possessed of no information which would indicate that such activities were being conducted within the confines of the property of the petitioner, until the circulars were passed out by CIO organizers (R. 82). Next day, the President of petitioner called the superintendents and instructed them as follows: (1) the employees have a right to discuss these things; (2) the superintendents should instruct all their supervisory force not to discuss the matter with any of the workmen; (3)

that it is a matter of their own free will and volition; (4) the company cannot in any way interfere or suggest, advise or coerce them; (5) if any activities or discussion interfere with their work the supervisors and their force shall notify such employees that they will have to stop, and if they do not stop, to take disciplinary action. These instructions were to apply to all employees, irrespective of the union for which they were soliciting (R. 208, 83). The President knew nothing about the Independent until counsel for petitioner received a petition from attorney for the Independent (R. 83).

Specifications of Errors to Be Urged

The Circuit Court of Appeals erred:

(1) In holding that the National Labor Relations Board is justified in concluding that the employees did not have complete and unhampered freedom of choice which the Act contemplates.

(2) In rendering a decree which is in conflict with what we believe to be a proper construction of the decisions of this Court in *International Association of Machinists* v. *N. L. R. B.*, 311 U. S. 72, 80; *N. L. R. B.* v. *Link-Belt Company*, 311 U. S. 584, 599; and *H. J. Heinz Co.* v. *N. L. R. B.*, 311 U. S. 514, 520.

(3) In enforcing the order of the National Labor Relations Board.

Reasons for Granting This Writ

This case presents an important question with respect to the construction of the decisions of this Court in the *I. A. M.* case, the *Link-Belt* case, and the *Heinz* case, wherein the doctrine of *respondeat superior*, the objective theory, was supplanted by a new subjective theory which, in effect,

has caused the lower court to make the responsibility of the employer turn upon what the employees themselves believe to be the authority of the supervisory employees, irrespective of the actual scope of supervisory employees' authority, expressed, implied or apparent.

When a major labor union brings charges against an employer, the latter has three hurdles to overcome; first, the National Labor Relations Board, which has on numerous occasions been inconsistent in its findings; second, Circuit Courts, which have handed down conflicting decisions on the question of employer-employee rights with relation to labor organizations; and, third, the decision of this Court in the *I. A. M.* and *Link-Belt* cases, wherein the Court has enunciated a new subjective theory that liability for an employer's violation of the National Labor Relations Act must turn upon whether the employees believed that the solicitors for a labor organization were acting for or on behalf of management.

If the Circuit Court is to apply the doctrine of the Supreme Court as laid down in these cases, then, in order to evaluate the actual consequences, it is important and essential that it determine just what reasonable and justifiable impressions may have been made on the minds of the employees by reason of the acts or statements of supervisory employees.

Do the *I. A. M.* and *Link-Belt* and *Heinz* cases apply to all National Labor Relations Board cases, or do they apply only when the Board has found that the employer was guilty of unfair labor practices by interference, restraint, coercion and domination of the formation of the union by means of threats of discharge, transfer, discipline or discrimination against the employees, or other change in the status of an employee.

In *International Association of Machinists* v. *N. L. R. B.*, *supra*, this Court said:

> "Thus where the employees would have just cause to believe that solicitors professedly for a labor organization were acting for and on behalf of the management, the Board would be justified in concluding that they did not have the complete and unhampered freedom of choice which the Act contemplated * * * but they did exercise general authority over the employees and were in a strategic position to translate to their subordinates the policies and desires of the management. It is clear that they did exactly that."

In *N. L. R. B.* v. *Link-Belt Company*, *supra*, this Court said:

> "As we indicated in *International Asso. M. T. D. L. M. L.* v. *National Labor Relations Bd.*, *supra*, the strict rules of respondeat superior are not applicable to such a situation. If the words or deeds of the supervisory employees, taken in their setting, were reasonably likely to have restrained the employees' choice and if the employer may fairly be said to have been responsible for them, they are a proper basis for the conclusion that the employer did interfere. If the employees 'would have just cause to believe that solicitors professedly for a labor organization were acting for and on behalf of the management, the Board would be justified in concluding that they did not have the complete and unhampered freedom of choice which the Act contemplates.' *International Asso. M. T. D. L. M. L.* v. *National Labor Relations Bd.*, *supra*. Here such inferences were wholly justified."

And in *H. J. Heinz Co.* v. *N. L. R. B.*, *supra*, this Court said:

> "There is evidence supporting the Board's conclusion that the employees regarded the foremen and group leaders as representatives of the petitioner and that a

> number of employees signed as members of the Association only because of the fear of loss of their jobs or of discrimination by the employer induced by the activities of the foremen and group leaders."

and this Court held that, by reason of this fear on the part of the employees, such action prejudiced the rights of the employees to self-organization, and the test of the *I. A. M.* and *Link-Belt* cases was held to apply.

The facts in the *I. A. M.* and *Link-Belt* cases show that the employees were threatened with discharge, were actually discharged for refusal to join the I. A. M. or the Independent, and were in fear of discharge if they engaged in union activities. In the *Heinz* case, the employees were in fear of loss of job if they did not join the Independent, and were threatened with discharge if they joined the union. In the *I. A. M.* case, the vice-president, general manager and works manager actively participated in acts against the CIO. In the *Heinz* case, the president was advised of the situation and took no action.

In *N. L. R. B.* v. *Pacific Gas and Electric Company*, 118 F. (2d) 780 (C. C. A. 9), after discussing the *I. A. M.*, *Link-Belt* and *Heinz* cases, the court said:

> "* * * * if a reasonable man, in the position of an employee, could conclude or infer that the acts and deeds of the supervisory officials represented the attitude of the employer, then the Board may find that such acts and deeds were the acts and deeds of the employer.
>
> "If none of the statements made could constitute interference, restrain or coercion of the employer, then respondent has not been guilty of any unfair labor practices."

In *N. L. R. B.* v. *Cities Service Oil Company*, 129 F. (2d) 933 (C. C. A. 2), where five employees were discharged because of union activities and refusal to join the Inde-

pendent, the court, after quoting from the *I. A. M.* case, said:

> "Test of respondent's activities for its subordinates is as held in the *I. A. M.* case, whether the employees had just cause to believe that the company approved of those activities * * *"

In *North Carolina Finishing Company* v. *N. L. R. B.*, 153 F. (2d) 714 (C. C. A. 4), where employees were threatened with discharge if they engaged in union activities and one employee was discharged because of union activities, the court said:

> "Nor are we unaware of the principle announced by us in *N. L. R. B.* v. *Mathieson Alkali Works*, 114 F. (2d) 796, 802, that '* * * mere isolated expressions of minor supervisory employees, which appear to be nothing more than the utterances of individual views, not authorized by the employer and not of such a character or made under such circumstances as to justify the conclusion that they are an expression of his policy, will not, ordinarily, justify a finding against him,"

and the court observed that that doctrine did not fit the facts in that case, apparently for the reason that employees were discriminated against by discharge and threats of discharge.

In these Circuit Courts of Appeals decisions, emphasis is placed, as we believe it should be, on (1) what a reasonable man could conclude and infer, (2) that they should have a just cause to believe that they do not have a free choice, and (3) that without interference, restraint or coercion by the employer, the latter could not be held guilty of unfair labor practices.

There is no evidence or proof in the record that any statements made by any employee, supervisory or not, led

to any injury or fear of injury to any employee by discharge, transfer, discipline, coercion or any other discriminatory acts by the employer or any employee.

The Board and the Circuit Court of Appeals finds that leadmen and instructors represent management. This is not substantiated by the evidence which shows that leadmen and instructors are *group leaders* and *setup men* (R. 38, 39, 42, 48, 59, 65, 72, 73, 85, 86, 130, 135, 193).

In *Ranco, Inc.*, 57 N. L. R. B. No. — decided 7/20/44, the Board held that group leaders and setup men were merely higher skilled employees who received higher rates of pay, distributed work to other employees, and reported to their supervisors inefficiency of employees, were paid on hourly basis, received compensation for overtime, had no authority to hire or discharge and did not attend supervisory meetings. On this basis the Board found that *group leaders* and *setup men* were not supervisory employees and were not acting with the support and approval of management, and the Board held that the company could not be charged with unfair labor practices attributed to these employees and dismissed the complaint and reversed the finding of the Trial Examiner. This decision was rendered less than one month prior to the filing of the Board's brief in the instant case. How the Board could find that the employees of the Engineering & Research Corporation, acting as *group leaders* and *setup men*, represented management, after the decision in the *Ranco* case, is beyond our ken.

As to the activities of the elected officers of the Independent referred to by the Circuit Court of Appeals:

Anders, an inspector, was elected president of the Independent and resigned. The National Labor Relations Board, in *Consolidated Vultee Aircraft Corporation*, 58 N. L. R. B. No. 191, decided 10/14/44, has held that inspectors are not supervisory employees.

Van Horn was a clerk in the Accounting Department, was promoted to supervisor of accounts, was elected vice-president of the Independent and resigned.

Huber, referred to as an assistant purchasing agent, was only a glorified typist, without authority, and acted under the supervision of his superior.

Conclusion

Therefore, it is respectfully submitted that this petition for a writ of certiorari to review the judgment of the United States Circuit Court of Appeals for the Fourth Circuit should be granted.

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MILTON W. KING,
ELLIS B. MILLER,
Of Counsel.

APPENDIX

NATIONAL LABOR RELATIONS ACT

Title 29, U. S. C. A., Sections 157 and 158

(49 Stat. 449)

Rights of Employees

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

Sec. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7.

(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided*, That subject to rules and regulations made and published by the Board pursuant to section 6 (a), an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	3
Argument	10
Conclusion	12

CITATIONS

Cases:

Birmingham Post Co. v. *National Labor Relations Board*, 140 F. (2d) 638 (C. C. A. 5) — 10

Consumers Power Co. v. *National Labor Relations Board*, 113 F. (2d) 38 (C. C. A. 6) — 11

Heinz Co., H. J. v. *National Labor Relations Board*, 311 U. S. 514 — 10, 11

International Association of Machinists v. *National Labor Relations Board*, 311 U. S. 72 — 10, 11, 12

National Labor Relations Board v. *Cities Service Oil Co.*, 129 F. (2d) 933 (C. C. A. 2) — 11

National Labor Relations Board v. *Link-Belt Co.*, 311 U. S. 584 — 11

North Carolina Finishing Co. v. *National Labor Relations Board*, 133 F. (2d) 714 (C. C. A. 4), certiorari denied, 320 U. S. 738 — 11

Solvay Process Co. v. *National Labor Relations Board*, 117 F. (2d) 83 (C. C. A. 5), certiorari denied, 313 U. S. 596 — 11

Statute:

National Labor Relations Act (Act of July 5, 1935, 49 Stat. 449, 29 U. S. C. 151, *et seq.*):

Sec. 7 — 2

Sec. 8 (1) — 2

Sec. 8 (2) — 2

Sec. 10 (c) — 3

Sec. 10 (c) — 3

625100—45

In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 750

ENGINEERING & RESEARCH CORPORATION,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (R. 219) is reported in 145 F. (2d) 271. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 1–10) are reported in 55 N. L. R. B. 137.

JURISDICTION

The decree of the court below (R. 220–221) was entered on October 12, 1944. The petition for a writ of certiorari was filed on December 12,

1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended, by the Act of February 13, 1925, and under Section 10 (e) of the National Labor Relations Act.

QUESTION PRESENTED

Whether there is substantial evidence to support the Board's findings that petitioner dominated and interfered with the formation and administration of, and contributed support to, a labor organization of its employees in violation of Section 8 (2) and (1) of the National Labor Relations Act.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, 49 Stat. 449, 29 U. S. C. 151, *et seq.*) are as follows:

> SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.
>
> SEC. 8. It shall be an unfair labor practice for an employer—
>
> (1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.
>
> (2) To dominate or interfere with the formation or administration of any labor

organization or contribute financial or other support to it: * * *

* * * * *

SEC. 10.

* * * * *

(c) * * * If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. * * *

* * * * *

(e) * * * The findings of the Board as to the facts, if supported by evidence, shall be conclusive. * * *

* * * * *

STATEMENT

Upon the usual proceedings, the Board, on February 29, 1944, issued its findings of fact, conclusions of law, and order (R. 1–10). The pertinent facts, as found by the Board and shown by the evidence, may be summarized as follows:

In May 1943, the United Automobile, Aircraft & Agricultural Implement Workers, affiliated

with the C. I. O., and herein referred to as the C. I. O., launched a campaign to organize petitioner's plant (R. 4; 18–19, 24–25, 82). Shortly thereafter an unaffiliated labor organization, the Aircraft Workers Council, hereinafter called the Independent, came into existence (R. 3, 4; 51, 66–67). About 30 employees in the various departments circulated among the employees on all three shifts a petition which designated the Independent as bargaining agent (R. 4; 36–37, 68–69). The solicitations on Independent's behalf were, for the most part, carried on during working hours and with widespread tolerance on the part of petitioner's supervisory force (R. 4, 6; 13–14, 25–26, 34–37, 68–69, 70–71). Indeed, a number of instructors and leadmen, who were supervisory employees (*infra*, pp. 7–9), assisted in circulating the Independent petition (R. 4; 40, 46, 69).[1] Petitioner took no effective steps to dissipate the natural tendency of the employees to presume therefrom that petitioner approved what was being done (R. 7; 88, 90). As a result of this widespread use of petitioner's time and property in the solicitation of members and the assistance given to the Independent by members of petitioner's supervisory force, the signatures of 1,064 of petitioner's approximately 1,800 employees were obtained within two days (R. 4, 6–7; 35, 58, 63, 92).

[1] A few of these supervisory employees themselves signed the petition (R. 13–14, 43, 80–81).

After the signatures had been obtained, the Independent elected officers (R. 4–5, 6; 31–32, 92), most of whom were either supervisory employees or held positions close to management; none of them was a production employee. Thus Anders, an inspector, was elected president (R. 31–32); Van Horn, supervisor of accounts, was elected vice president (R. 6; 32, 55); Basile, a leadman, was elected secretary (R. 5; 32, 62, 64–65); and Huber, assistant purchasing agent, was elected treasurer (R. 6; 32, 49, 51). On May 31, Van Horn and Huber offered to resign "because of their close connections with the office," but their resignations were not accepted (R. 6; 93–94).[2] Again assisted by supervisory employees, the Independent conducted elections for "delegates" or representatives in the various departments during working hours (R. 4, 6; 41, 43–44, 48).[3]

Although instructions were given to supervisors that the employees had a right to discuss unions whenever they wanted to without interference from management, so long as such activities did not interfere with production (Pet. 4–5),

[2] Supervisor Van Horn resigned his position as vice president on July 15, after charges had been filed alleging that the Independent was company-dominated (R. 6; 32).

[3] Instructors Kaminer and Geary assisted in the distribution of ballots, suggested nominees, and counted the ballots after they were cast (R. 43–44, 48).

petitioner's policy as thus announced was not, as the Board found, applied equally as between the C. I. O. and the Independent (R. 7).[4] Shortly after the C. I. O. commenced its membership campaign, petitioner's head guard learned that a group of women employees intended to discuss the C. I. O. in the rest room and instructed Guard Mosley to attend (R. 4, 7; 19). She attended pursuant to instructions, and disbanded groups discussing the C. I. O. (R. 4, 7; 19–20, 22–23).[5] Likewise indicative of petitioner's lack of neutrality in the organizational campaigns of the two labor organizations, is its treatment of employee Rappaport, one of the most active of the C. I. O. adherents (R. 4, 7; 24–25). Rappaport was warned by Supervisor Bittenbender in the presence of other employees that he should not solicit C. I. O. memberships "on company time or in the plant" because such activities would be in violation of petitioner's Rule 8 which forbade employees from doing "work of a personal nature . . . without an order" (R. 4, 7; 35, 61–62). This admonition was, of course, not in line with petitioner's professed policy of permitting employees to discuss unions whenever

[4] In no instance does it appear that the instructions were made known to the ordinary employees (R. 7; 88, 90).

[5] Most of the employees present were utilizing their regular rest period which petitioner permitted each employee (R. 23).

they wanted to so long as such discussions did not interfere with production (*supra*, p. 5).[6]

The Board found that petitioner is accountable for the above-described conduct of its leadmen, instructors, and other employees close to the management (R. 5, 6). The leadmen and instructors assist the foremen in the operation of their respective departments (R. 5; 86)[7] Superintendent Stout recognized the supervisory status of leadmen by requesting foremen under him to convey to the leadmen petitioner's instructions regarding noninterference with union activities (R. 5; 88–89, 91). Although President Wells characterized leadmen as "working foremen," neither leadmen nor instructors perform any manual work but, under the direction of a foreman or supervisor, devote their time to supervising, instructing, and assigning work to groups of employees (R. 5; 38–39, 42–43, 59, 65, 78–79,

[6] Shortly thereafter, another supervisory employee, Instructor Baggett, checked up on Rappaport's activities by inquiring of an employee whether "Rappaport had talked any C. I. O. to [him] during working hours" (R. 26). This same supervisory employee later not only failed to stop the circulation of a petition in behalf of the Independent in his department during working hours, but himself signed the petition (R. 13–14).

[7] Leadmen and instructors both have substantially the same functions and responsibilities and, as between those here involved, there is no discernible difference. In fact, the term "leadman" is frequently used throughout the record in referring to a particular instructor or to the position held by an instructor (R. 5; 12, 42, 43, 48, 78–80).

81, 85–86).[8] They also take the place of the foremen and supervisors when the latter are absent from their departments (R. 5; 79). As in the case of foremen, their time is charged to nonproduction, whereas the time of production employees is charged to the particular part or instrument on which the employee worked (R. 5; 14–15, 39). Leadmen and instructors are responsible for the work of the men under them, and it is their duty to report on the aptitude of the employees under them; they may also recommend raises in pay (R. 5; 15–16, 27, 39–40, 65, 79). A number of them had reported to their foreman or supervisor the employees whom they considered incapable of properly performing their work; the foreman or supervisor thereupon transferred or discharged the unsatisfactory employees (R. 5; 13, 16, 28, 65). In no instance does it appear that such a report by the leadman or instructor failed to result in a transfer or discharge of the employee complained of. From these facts, the Board concluded that leadmen and instructors have power effectively to recommend changes in the status of production employees working under them, that they exercise such power, and that the production employees had just cause to believe that leadmen and in-

[8] The employees working under each leadman or instructor range in number from about five to twenty (R. 5; 12, 38, 42, 81).

structors were representatives of management (R. 5).

In the eyes of the employees generally, Supervisor Van Horn (vice president of the Independent) and Assistant Purchasing Agent Huber (treasurer of the Independent) were likewise representatives of management. Huber is one of two assistant purchasing agents employed by petitioner (R. 6; 50). He purchases materials requisitioned by the planning department in amounts up to $10,000, and uses his own judgment in ordering the materials from available sources (R. 6; 50–51). He is a salaried employee and occupies an office directly in front of that of petitioner's treasurer (R. 6; 50, 51). Van Horn, as supervisor of accounts, is also a salaried employee (R. 6; 55). Both Van Horn and Huber considered themselves close to management (R. 6; 52). As shown, *supra,* p. 5, "because of their close connections" with management, both Huber and Van Horn offered to resign their offices in the Independent and, although their resignations were not then accepted, Van Horn later effectively resigned (*supra,* note 2). Huber continued to hold his position as treasurer of the Independent (R. 6; 51). The Board concluded that Huber and Van Horn "are closely associated and identified with management and that it reasonably appeared to the other employees that they

were in fact representatives of management" (R. 6).

Upon the foregoing facts, the Board concluded that petitioner had engaged in unfair labor practices within the meaning of Section 8 (1) and (2) of the Act and entered its order directing petitioner to cease and desist from engaging in such unfair labor practices, to withdraw recognition from and disestablish the Independent, and to post appropriate notices (R. 9–10). Thereafter, the Board filed a petition for enforcement in the court below (R. 215–218). On October 12, 1944, the court delivered its *per curiam* opinion (R. 219–220), and entered its decree (R. 220–221) enforcing the Board's order in full.

ARGUMENT

1. Petitioner's contention (Pet. 2–5) that the Board's findings of unfair labor practices are not supported by substantial evidence presents no question of general importance. In any event, the evidence summarized in the Statement (*supra*, pp. 3–10) affords full support for the challenged findings. Contrary to petitioner's contention (Pet. 4–5), it is clearly responsible for the conduct of its supervisors.[9] The Company's

[9] *H. J. Heinz Co.* v. *National Labor Relations Board*, 311 U. S. 514, 519, 520; *International Association of Machinists* v. *National Labor Relations Board*, 311 U. S. 72, 79–80; *Birmingham Post Co.* v. *National Labor Relations Board*, 140 F. (2d) 638, 639–640 (C. C. A. 5).

unenforced instructions of impartiality were not communicated to the employees and, therefore, did not neutralize the normally coercive effects of such conduct upon the employees.[10]

2. Petitioner attempts to place a novel interpretation upon the decisions of this Court in the *International Association of Machinists, Link-Belt,* and *Heinz* cases,[11] asserting that they apply "only when the Board has found that the employer was guilty of unfair labor practices by interference, restraint, coercion and domination of the formation of the union by means of threats of discharge, transfer, discipline or discrimination against the employees, or other change in the status of an employee" (Pet. 6). No court has so held. Interference and domination need not be flagrant before an employer may be held responsible for the activities of its supervisory employees; it is sufficient that "The employees

[10] See *Heinz* case cited *supra*, note 9; *Solvay Process Company* v. *National Labor Relations Board*, 117 F. (2d) 83, 85 (C. C. A. 5), certiorari denied, 313 U. S. 596; *Consumers Power Company* v. *National Labor Relations Board*, 113 F. (2d) 38, 44 (C. C. A. 6); *National Labor Relations Board* v. *Cities Service Oil Co.*, 129 F. (2d) 933, 936 (C. C. A. 2); *North Carolina Finishing Co.* v. *National Labor Relations Board*, 133 F. (2d) 714, 716 (C. C. A. 4), certiorari denied, 320 U. S. 738.

[11] *International Association of Machinists* v. *National Labor Relations Board*, 311 U. S. 72, 80; *National Labor Relations Board* v. *Link-Belt Company*, 311 U. S. 584, 599; *H. J. Heinz Company* v. *National Labor Relations Board*, 311 U. S. 514, 520.

would have just cause to believe that solicitors professedly for a labor organization were acting for and on behalf of the management * * *". *International Association of Machinists* v. *National Labor Relations Board,* 311 U. S. 72, 80. There is nothing in the decision of the court below which is in conflict with these cases; that decision conforms to the criteria enunciated by this Court.

CONCLUSION

The decision below, sustaining the Board's findings and order, is correct and presents no conflict of decisions nor any question of general importance. The petition for a writ of certiorari should, therefore, be denied.

Respectfully submitted.

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